

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT L. SANDERS

APPELLANT

VS.

NO. 2008-KA-0787

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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NO. 2008-KA-0787-COA

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STATEMENT OF THE CASE

Procedural History

Robert L. Sanders was tried in the Circuit Court of Lafayette County on a charge of armed robbery, convicted of the lesser offense of simple robbery, and sentenced to a term of 15 years in the custody of the Mississippi Department of Corrections with three years suspended. (C.P.26-27) Aggrieved by the judgment rendered against him, Sanders has perfected an appeal to this Court.

Substantive Facts

At approximately 1:00 the morning of December 26, 2007, Sergeant Jimmy Williams of the Oxford Police Department was dispatched to investigate a reported robbery at the Subway sandwich shop on University Avenue. When he arrived there, Sergeant Williams spoke with the cashier, Dominic McNeil, who stated that “they had been robbed.” Sergeant

Williams observed that “[t]here were other patrol officers in the area out looking for the suspect.” (T.77-79) When asked to elaborate on what Mr. McNeil had told him, Sergeant Williams testified as follows:

[H]e said the suspect came into the store and asked for change for a dollar bill and as he opened the drawer he said give me all your money. And Mr. McNeil said you are kidding. He said, no, I’m serious. He said, give me all the money and McNeil stated that he indicated, he stuck his hand in his pocket. He had on dark clothing, he said, like a sweat shirt on. Apparently it must have had a pocket or something because the suspect had his hand in his pocket and it was pointed like this and he said, no. Dominick said that is not a gun. That is your finger. He said no, I have something in here and he gave him the cash tendered from the drawer and the suspect left.

(T.79)

Mr. McNeil described the suspect as a black male, about six feet one inch tall, and said that he had a stutter or some sort of speech impediment, rough hands, and “something wrong with his teeth.” According to Sergeant Williams, “[a]ll this information was put out to other units.” (T.80)

Captains attempted to track the suspect by using a police dog, but they were unsuccessful. The next morning, Sergeant Williams presented Mr. McNeil with a photographic lineup, but this, too, proved fruitless. (T.79-83)

Within the next week, Agent Chris McAllister of the Mississippi Bureau of Narcotics informed Sergeant Williams that “he had a suspect,” whom he had identified from information obtained “from the metro narcotics unit.” Ultimately, Sergeant Williams learned that this suspect was Robert L. Sanders. He then obtained a photograph of Sanders, assembled another photographic lineup containing this photograph, and showed it to Mr. McNeil, who immediately, unequivocally and without hesitation identified Sanders as the

robber. Thereafter, Sergeant Williams obtained a warrant for Sanders's arrest and "placed a bolo" for him. (T.83-90)

Captain Kevin Stark of the Oxford Police Department testified that his duties included patrolling in neighborhoods, particularly high-crime areas such as River Hills. When Captain Stark was asked whether he had ever encountered the defendant, Robert Sanders, he answered, "Yes." (T.98-99) He went on to testify as follows:

This was back in December, I received a call from another law enforcement [Agent McAllister] officer who was conducting an investigation. He ask[ed] me if he [sic] could identify this certain person that he had an image of. I looked at the image. I told him I couldn't identify him by name but I just saw him walking on the street in this particular neighborhood.

* * * * *

After I looked at the image and told him I didn't know him but I just saw him. We decided that since I'd been up there just a few minutes prior talking to people I would see if I could see him again and engage him in conversation and see if I could get him to tell me his name.

(T.99-100)

Captain Stark then "drove back up on Robinson Road" and "[t]urned on Pegues then on Vaughn Circle" where he had seen "this person walking."¹ He "encountered him again." This individual "was sitting on the porch at one of the houses." Upon engaging him in a conversation, Captain Stark noticed that he "had somewhat of a speech impediment" and "a

¹Captain Stark testified that this address on Vaughn Circle, in the River Hills neighborhood, was approximately one half mile "[b]y way of the street" from the Subway on University Avenue. The route "through the back ways" was shorter. (T.101)

gap in his teeth.” The suspect, who identified himself as Robert Sanders, told Captain Stark that he worked at Martin Brothers, a concrete construction business. At the conclusion of this conversation, Captain Stark “went back and met with Agent McAllister” and gave him this information. (T.100-03)

Agent McAllister testified that in December 2007, he learned of the investigation of this robbery and was provided with a description of the suspect. On the Wednesday following the robbery, while conducting his own investigation in the River Hills area, he “came in contact” with a person matching the description.² At that point, he asked Captain Stark to help him identify the suspect. (T.104-06)

Kelly Bergman, a student at the University of Mississippi, was working with Mr. McNeil at the Subway that night. At approximately 1:00 a.m., Mrs. Bergman was “up front” while Mr. McNeil was “in the back doing work to clean up to get ready to close. That was about the time” a man walked into the store. He wearing a hooded sweatshirt, and she noticed that “his hands were very rough looking and gray as if he did some sort of construction ... like he had been working outside.” Mrs. Bergman offered to take his order, but she could not understand his responses. According to her, “It sounded like he was asking for change ... or something ...” Finally, Mr. McNeil approached the register to try to accommodate the man, and Mrs. Bergman went to the ladies’ room. (T.107-09)

When she returned to the front of the shop, the man “was already gone.” Mr. McNeil, in the process of telephoning the authorities, told her that he had been robbed. (T.112)

²Agent McAllister identified this man as the defendant. (T.106)

The prosecutor asked Mrs. Bergman, "Do you know whether any one here is the man that robbed you?" She answered, "Not with certainty, no." (T.112)

The state finally called Mr. McNeil, also a student at the University of Mississippi, and asked him whether "anything unusual" had happened during the morning in question. (T.114) Mr. McNeil responded as follows:

Yes, sir. We had an older male come in, black male about 30 late 30's or early 40's. He came in. He had a dark blue sweat shirt hoody on with a ball cap and he came in. We didn't understand what he was saying at first. It was side of a dollar or change for a dollar or change with a dollar.

(T.114)³

They had difficulty understanding the man because he had some sort of speech impediment. As Mrs. Bergman was putting on her gloves to prepare to make a sandwich, Mr. McNeil "came from the side of the bane ... to assist her to see if she needed any help." (T.114-15) When the man "took out some change," Mr. McNeil "figured he wanted to change his change to a dollar." At that point, Mrs. Bergman went to the restroom. (T.117-18) Mr. McNeil described what happened next as follows:

So she leaves the room and it's me and him, he is a little bit taller than me. He had some facial hair and I noticed he had some space in his teeth and he goes to hand me some change so I hit cash drop which is our no sale button basically to open up the register and at that point he said give me the money in the register.

* * * * *

³Mr. McNeil testified that he was in a position to see this individual before he actually entered the store. (T.116)

Give me the money in the register. So I didn't believe him. I thought he was just kidding. I said, no man, you are joking. He said no man give me the money in the register. I point up there is a camera pointing down. I said we have a camera on you, you are not going to get that far. He said no, give me the money in the register. So he puts his hand in the front part of his hoody, there is pockets in it and he does something but points through his hoody with something in there and said give me the money in the register and I said, man it's just your hand. You don't want to do this. He said no it's more than just my hand. I said, all right it's not worth dying for Subway for. So I gave him the money from the register and he goes out the same way he came from University Avenue.

(T.118)⁴

When the man reached out to take the money, Mr. McNeil noticed that he "had really gray rough hands like he worked in ... construction or concrete ... " (T.119)

Mr. McNeil corroborated Sergeant Williams's testimony about the photographic lineups. Regarding his perusal of the second array, Mr. McNeil testified that he had positively identified the defendant as the robber. He also made a positive in-court identification of the defendant. Asked whether he had any doubt about this identification, Mr. McNeil answered, "No, sir." Finally, Mr. McNeil testified that he relinquished the money because he was "scared" and "didn't want to die." (T.121-24)

The defense called one witness, the defendant's wife, Petsey Sanders, who testified that the defendant was at home with her at the time this crime was committed. (T.139)

⁴Mr. McNeil ascertained later that the surveillance camera was not working at the time. (T.120)

SUMMARY OF THE ARGUMENT

The state submits the verdict is not contrary to the overwhelming weight of the evidence. The state presented substantial proof that the defendant was guilty of robbery.

PROPOSITION ONE:

THE VERDICT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

The sole issue presented on this appeal is whether the trial court erred in denying his motion for new trial on the ground the verdict is against the overwhelming weight of the evidence. To prevail, Sanders must satisfy the following formidable standard of review:

The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is also well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Collins v. State*, 757 So.2d 335, 337(¶ 5) (Miss. Ct. App. 2000) (quoting *Dudley v. State*, 719 So.2d 180, 182(¶ 9) (Miss.1998)). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Collins*, 757 So.2d at 337(¶ 5) (citing *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992)). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Collins*, 757 So.2d at 337(¶ 5) (quoting *Dudley*, 719 So.2d at 182).

Carle v. State, 864 So.2d 993, 998 (Miss. App. 2004).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As the Mississippi Supreme Court reiterated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for

the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury.” [citations omitted]

In this case, “[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify.” *White v. State*, 722 So.2d 1242, 1247 (Miss.1998). While Sanders had the right not to take the stand, his failure to do so left the jury free to give “full effect” to the state’s evidence against him. *Miller v. State*, 983 So.2d 1051, 1054 (Miss.2008), citing *White*.

The center of Sanders’s argument is an attack on the state’s proof of identity. We incorporate by reference the proof set out in our Statement of Substantive Facts to support our position that the prosecution presented substantial credible evidence that Robert Sanders committed this robbery. Specifically, Mr. McNeil identified Sanders unequivocally and without hesitation from both the photographic lineup and at trial.⁵ See *Houston v. State*, 887 So.2d 808, 816 (Miss. App. 2004). This case presented a straight issue of fact which was properly resolved by the jurors. No basis exists for disturbing their verdict.

⁵As for Mrs. Bergman’s inability to make a positive identification, the state submits the evidence supports the inference that Mr. McNeil had a better opportunity and more time to observe the robber. In any case, this issue was for the jury’s determination.

CERTIFICATE OF SERVICE

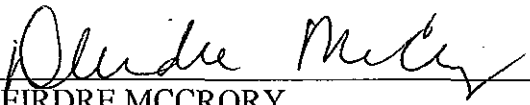
I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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